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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

YOGESH SHAH,

Plaintiff and Appellant,

v.

COUNTY OF LOS ANGELES,

Defendant and Appellant.

B291084

(Los Angeles County
Super. Ct. No. BC637238)

APPEALS from a judgment and a postjudgment order of the Superior Court of Los Angeles County, Elizabeth R. Feffer, Judge. Affirmed.

Tracy Neal-Lopez for Plaintiff and Appellant.

Gutierrez, Preciado & House, Nohemi Gutierrez Ferguson, Calvin House and Clifton Allen Baker for Defendant and Appellant.

Plaintiff and appellant Yogesh Shah (Shah) appeals a judgment following a grant of summary judgment in favor of his former employer, defendant and respondent County of Los Angeles (the County).¹

The County cross-appeals from a postjudgment order denying its motion to recover attorney fees against Shah.

We affirm in full. We conclude the grant of summary judgment was proper because Shah failed to raise a triable issue of material fact that his discharge was motivated by discriminatory animus. We also conclude the denial of the County's motion for attorney fees was proper because the trial court acted within its discretion in finding that Shah's claims, although unsuccessful, were not frivolous, unreasonable or groundless.

FACTUAL AND PROCEDURAL BACKGROUND

1. Pleadings.

Shah was employed by the County as a pharmacy supervisor for the High Desert Health System facility, located in Lancaster, California, from February 2011 until his termination on December 9, 2015.

In this employment discrimination action against the County and Panoussi, commenced on October 13, 2016, Shah filed an operative first amended complaint that alleged the

¹ Although defendant Romina Panoussi (Panoussi), Shah's supervisor at the County, is listed on the briefs as a respondent and cross-appellant, it does not appear that she is a party to either the appeal or the cross-appeal. Panoussi was not named as a respondent in Shah's Civil Case Information Statement, and on the cross-appeal, she did not join in the notice of appeal filed by the County.

following five causes of action pursuant to the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.):² (1) age discrimination; (2) harassment on the basis of age; (3) disability discrimination; (4) retaliation for complaints of harassment and discrimination; and (5) failure to prevent, correct and remedy discrimination and harassment.³

Shah alleged in substance: he was subjected to ongoing harassment and discrimination based on his age (he was 63 at the time he filed the operative complaint) and disability (back and knee pain); he was retaliated against for complaining of harassment and discrimination; and he was terminated after being falsely accused in June 2015 of dispensing medication without a label.⁴

2. *The County's motion for summary judgment.*

The County filed a motion for summary judgment, or in the alternative, summary adjudication. The County asserted that Shah was required to file an administrative charge with the

² All further statutory references are to the Government Code, unless otherwise specified.

³ The complaint also alleged a cause of action for wrongful termination (sixth cause of action). The trial court ruled on summary judgment that because public entity liability is statutory, a common law wrongful termination claim does not lie. (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 899–900.) On appeal, Shah does not challenge the trial court's ruling with respect to the sixth cause of action.

⁴ Although Shah pled he was subjected to discrimination on the basis of age as well as disability, his evidentiary showing was focused on the issue of age discrimination.

Department of Fair Employment and Housing (DFEH) within one year after the alleged unlawful employment practices on which he based his claim. Shah was placed on paid administrative leave on September 22, 2015, and was discharged on December 9, 2015. He filed a charge with the DFEH on October 5, 2016. The County argued that because Shah was out on leave as of September 22, 2015, the only alleged unlawful act that occurred during the year preceding the October 5, 2016 DFEH complaint was Shah's termination on December 9, 2015. Thus, the only allegedly unlawful act by the employer within the limitations period was Shah's discharge.

As for the discharge itself, the County argued that Shah could not establish a prima facie case because he was not performing his job competently, the County had legitimate, nondiscriminatory reasons for discharging Shah, and he could not establish the County's stated reasons for the discharge were pretextual.

In support, the County asserted that in a June 17, 2015 incident (the June 17 incident) recorded by two closed-circuit cameras, Shah placed two pills in an unmarked vial and handed the vial to D.E., the husband of patient R.E., who had been waiting for the medication. Shah's dispensing of medication without a label violated state law (Bus. & Prof. Code, § 4076, subd. (a); Cal. Code Regs., tit. 16, § 1717) and the County's own policy. Further, after being instructed not to discuss the June 17 incident, Shah repeatedly approached his colleagues and attempted to gather information from them about the County's investigation into the incident. In addition, a software report showed that following the June 17 incident, Shah accessed the

patient records of R.E. and her husband on six separate dates without a business-related reason, in violation of County policy.

3. *Shah's opposition to the motion for summary judgment.*

In opposition, Shah argued that pursuant to the continuing violation doctrine, he was entitled to seek redress for the County's entire course of conduct, including acts that occurred more than one year before he filed his DFEH claim, because the earlier discriminatory acts were sufficiently similar in kind to those that occurred within the statutory period.

As for the June 17 incident, Shah contended it had been mischaracterized in an effort to discredit him and discharge him, and he asserted that other pharmacists had made egregious medication errors without facing any disciplinary action.

4. *Trial court's order granting summary judgment.*

The trial court ruled that claims arising out of any alleged discriminatory conduct that occurred more than one year before Shah filed his DFEH charge on October 5, 2016 were barred by the applicable one-year statute of limitations, because the earlier conduct was not sufficiently similar to the conduct within the statutory period, i.e., the termination, to constitute a continuing violation. The trial court also found that to the extent the alleged conduct by Shah's supervisors, such as denying him promotions and falsely evaluating his performance, could be held to constitute a continuing violation, the evidence established that such conduct had gained permanence by October 2, 2015, when the County gave notice to Shah of its intent to terminate him. Shah did not file his DFEH charge until one year and three days later, on October 5, 2016. Therefore, Shah's claims arising out of any alleged acts that occurred prior to October 5, 2015 were barred.

With respect to Shah's termination, the trial court found that the County's evidence was sufficient for it to meet its initial burden to demonstrate the existence of legitimate, nondiscriminatory reasons for Shah's discharge, and that Shah's evidence, viewed in the light most favorable to Shah, "only goes to the question of whether [the County's] action in terminating his employment [was] sound." The trial court observed, "[i]ndeed, . . . [Shah] admits giving the patient an unmarked bottle of pills, discussing the incident with co-worker witnesses, and accessing the records of the complaining patient. Accordingly, [Shah's] evidence and explanation of his performance is insufficient to demonstrate a triable issue of fact regarding the legitimacy of the County's action."

Finding no triable issue of material fact, the trial court granted summary judgment in favor of the County and Panoussi.⁵

Shah filed a timely notice of appeal from the judgment.

5. Trial court's order denying the County's motion for attorney fees.

On July 2, 2018, the County and Panoussi filed a motion seeking \$206,157.50 in attorney fees against Shah. Defendants contended they were entitled to recover fees pursuant to section 12965 because Shah's FEHA claims were frivolous from the start, as he admittedly dispensed unlabeled medication.

⁵ In its ruling, the trial court also sustained certain evidentiary objections by the County to Shah's opposing declaration and exhibits, which will be addressed in the Discussion.

In opposition, Shah contended that defendants had failed to meet the standard for attorney fees prescribed by *Christianburg Garment Co. v. EEOC* (1978) 434 U.S. 412 (*Christianburg*), as his case could not be characterized as frivolous or brought in bad faith, nor did Shah continue to litigate a claim without a factual basis.⁶

The trial court ruled that Shah had failed to raise a triable issue of material fact in opposition to the motion for summary judgment, “[b]ut, applying the *Christianburg* standard, it does not appear to this court that the action was maintained in bad faith. [¶] So, for those reasons, the court denies defendant’s motion for fees.”

The County filed a timely notice of appeal from the postjudgment order denying its motion for attorney fees.

CONTENTIONS

Shah contends the grant of summary judgment was error because his claims based on conduct that occurred more than one year before he filed his DFEH complaint on October 5, 2016 are actionable under the continuing violation doctrine, and he raised a triable issue of material fact that the County’s stated reasons

⁶ “The United States Supreme Court has held that, in a Title VII case, a *prevailing plaintiff* should ordinarily recover attorney fees unless special circumstances would render the award unjust, whereas a *prevailing defendant* may recover attorney fees only when the plaintiff’s action was frivolous, unreasonable, without foundation, or brought in bad faith. (*Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412, 416–417, 421–422.) California courts have adopted this rule for attorney fee awards under the FEHA. [Citations.]” (*Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 985 (*Chavez*).)

for terminating him were a pretext for discrimination. Shah also contends that the trial court erred in sustaining certain evidentiary objections by the County.

On cross-appeal, the County contends the trial court erred in denying its motion for attorney fees because the trial court should have found that Shah's action was frivolous from the inception.

DISCUSSION

I. Shah's appeal.

1. Standard of appellate review.

We review a grant of summary judgment de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.)

We review the trial court's rulings on evidentiary objections pursuant to the abuse of discretion standard. (*Mackey v. Board of Trustees of California State University* (2019) 31 Cal.App.5th 640, 657.)

2. Grant of summary judgment was proper.

a. Trial court properly held that no triable issue exists with respect to alleged FEHA violations that occurred more than one year before October 5, 2016, when Shah filed his administrative complaint with the DFEH; Shah's reliance on the continuing violation doctrine is misplaced.

A litigant must file an administrative complaint with the DFEH within one year of the date of the alleged unlawful practice before suing for a violation of the FEHA. "No complaint may be filed after the expiration of one year from the date upon which the alleged unlawful practice or refusal to cooperate occurred" (§ 12960, subd. (d).)

The record reflects that Shah filed his administrative complaint with the DFEH on October 5, 2016, alleging, inter alia, that on or about December 9, 2015 (the date of his termination), the County engaged in a series of adverse actions against him, including discrimination, harassment, retaliation, and termination.

Because Shah filed his administrative complaint on October 5, 2016, any discriminatory conduct prior to October 5 2015 “cannot serve as the basis for liability unless some exception to the one-year limitations period applies.” (*Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1040.) The continuing violation doctrine is one such exception. (*Ibid.*)

“[T]he continuing violation doctrine comes into play when an employee raises a claim based on conduct that occurred in part outside the limitations period.” (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 812 (*Richards*).) In *Richards*, a disabled employee resigned from her job after a five-year period during which she claimed her employer was unwilling to effectively accommodate her disability. (*Id.* at p. 801.) The Supreme Court was called upon to decide whether “an employer [is] liable for actions that take place outside the limitations period if these actions are sufficiently linked to unlawful conduct within the limitations period.” (*Id.* at p. 812.) *Richards* concluded that an employer’s conduct over a period of time would be deemed a continuing violation “if the employer’s unlawful actions are (1) sufficiently similar in kind . . . ; (2) have occurred with reasonable frequency; (3) and have not acquired a degree of permanence. [Citation.]” (*Id.* at p. 823.) *Richards* reasoned, “we do not believe the FEHA statute of limitations should be interpreted to give a disabled employee engaged in the process of

seeking reasonable workplace accommodation or ending disability harassment two unappealing choices: on the one hand resigning and bringing legal action soon after the first signs that her rights have been violated, or on the other hand attempting to persist in the informal accommodation process and risk forfeiture of the right to bring such an action altogether.” (*Id.* at pp. 820–821.)

Here, between September 22, 2015 and December 9, 2015, the discharge date, Shah was on paid administrative leave. On October 2, 2015, while Shah was on administrative leave, the County gave him notice of its intent to discharge him. Shah filed his DFEH complaint on October 5, 2016, just over a year later. Because Shah was out on administrative leave as of September 22, 2015, the only potential FEHA violation that occurred during the one-year period preceding the October 5, 2016 DFEH complaint was Shah’s termination on December 9, 2015.⁷

⁷ Shah takes the position that the October 2, 2015 notice of intent to discharge was separately actionable as an act of retaliation, the notice of intent to discharge was not effective until October 7, 2015 due to a five-day extension of time for service by mail (Code Civ. Proc., § 1013, subd. (a)), and therefore the October 5, 2016 DFEH complaint was timely as to this alleged act of retaliation. The argument is not supported by the facts or the law. The parties’ respective separate statements established as an undisputed fact that the County “provided Shah with a notice of intent to discharge on October 2, 2015.” Shah’s assertion in his appellate briefs that on October 2, 2015, the County *mailed* a notice of intent to discharge to his home is not supported by any citation to the record. Moreover, Shah cites no authority for the proposition that the statutory provision for a five-day extension of time applies to an employer’s mailing of a notice of intent to discharge. (See *Vitkievich v. Valverde* (2012))

Therefore, the issue is whether alleged unlawful conduct that took place before October 5, 2015 was sufficiently similar in kind to the alleged unlawful conduct within the limitations period, i.e., the December 9, 2015 discharge, to be deemed a continuing violation.

Shah contends the County's conduct should be looked at as a whole, and he relies, inter alia, on the following: Panoussi verbally harassed him by making derogatory comments about his age; Panoussi assigned his supervisory duties to his younger subordinates; Panoussi engaged in behavior that interfered with Shah's performance in retaliation for his complaints; and Shah was suspended without cause and was given negative performance reviews, in retaliation for his earlier complaints.⁸ Thus, according to Shah, discriminatory and retaliatory conduct before October 2, 2015 (the date he was given a notice of intent to

202 Cal.App.4th 1306, 1313 [five-day extension under Code of Civil Procedure section 1013, subdivision (a) expressly applies only if a statute or rule of court establishes the time within which an act must be performed after service of the document].) Thus, the only alleged unlawful act during the one-year period preceding the October 5, 2016 DFEH complaint was the December 9, 2015 termination.

⁸ Shah also asserts the County's decision in September 2012 to select Panoussi as his supervisor, even though she was much younger and less experienced, was part of a continuing violation that culminated in his termination on December 9, 2015. The argument is meritless. The appointment of Panoussi as Shah's supervisor was not sufficiently similar to Shah's termination years later to constitute a continuing violation.

discharge) was sufficiently similar to conduct after October 2, 2015 to constitute a continuing course of unlawful conduct.

As indicated, an employer's conduct over a period of time may be deemed a continuing violation "if the employer's unlawful actions are (1) *sufficiently similar in kind* . . . ; (2) have occurred with reasonable frequency; (3) and have not acquired a degree of permanence. [Citation.]" (*Richards, supra*, 26 Cal.4th at p. 823, italics added.)

Here, the alleged unlawful acts by Panoussi—verbal harassment and adverse employment actions—that preceded October 5, 2015 are not actionable as a continuing violation because they were not sufficiently similar in kind to the act of termination that occurred on December 9, 2015. It was undisputed that the decision to terminate Shah was made by Beryl Brooks (Brooks), the High Desert Health System Administrator, who is responsible for operation of the five County clinics in the Antelope Valley, *not* by Panoussi. Further, Shah conceded that the vast majority of the issues used to support his discharge stemmed from the June 17 incident. Therefore, Shah's attempt to deem Panoussi's alleged discriminatory conduct and his termination by Brooks for dispensing unlabeled medication as a continuing course of unlawful conduct under the FEHA is meritless.⁹

⁹ With respect to the continuing violation doctrine, Shah also argues the October 2, 2015 notice of intent to discharge did not acquire the requisite degree of permanence because the notice gave him the opportunity to respond and to dispute the notice of intent to discharge, thus leaving open the possibility of a resolution of the dispute. It is unnecessary to address the issue of permanence because, as discussed, the alleged unlawful conduct that occurred outside the limitations period was not

In sum, the only potential FEHA violation that took place within one year of the October 5, 2016 DFEH complaint was the termination that occurred on December 9, 2015. We now address whether a triable issue of material fact exists in that regard.

b. *No triable issue of material fact as to Shah's termination; the County established legitimate nondiscriminatory reasons for discharging Shah and he failed to raise a triable issue as to discriminatory animus.*

(1) *General principles.*

Under the three-part *McDonnell Douglas* test (*McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [36 L.Ed.2d 668]), the plaintiff at trial has the initial burden to establish a prima facie case of discrimination, that is to say, “the plaintiff must provide evidence that (1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive.” (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354–355 (*Guz*).) If, at trial, the plaintiff establishes a prima facie case, a presumption of discrimination arises. (*Id.* at p. 355.) The burden then shifts to the employer to rebut the presumption by presenting evidence that its action was taken for a legitimate, nondiscriminatory reason. (*Id.* at pp. 355–356.) If the employer sustains this burden, the presumption of discrimination disappears. (*Id.* at p. 356.) The plaintiff then has the opportunity to attack the employer’s proffered reasons as

sufficiently similar in kind to the termination of Shah’s employment on December 9, 2015.

pretexts for discrimination, or to offer any other evidence of discriminatory motive. (*Ibid.*)

The *McDonnell Douglas* framework, which is applicable to trial of employment discrimination claims, “is modified in the summary judgment context. In a summary judgment motion in ‘an employment discrimination case, the employer, as the moving party, has the initial burden to present admissible evidence showing either that one or more elements of plaintiff’s prima facie case is lacking or that the adverse employment action was based upon legitimate, nondiscriminatory factors.’ (*Hicks v. KNTV Television, Inc.* (2008) 160 Cal.App.4th 994, 1003, citing *Guz, supra*, 24 Cal.4th at p. 357.)” (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 861 (*Serri*)). If “ ‘nondiscriminatory, [the employer’s] true reasons need not necessarily have been wise or correct. [Citations.] While the objective soundness of an employer’s proffered reasons supports their credibility . . . , the ultimate issue is simply whether the employer acted with a motive to discriminate illegally. Thus, “legitimate” reasons [citation] in this context are reasons that are facially unrelated to prohibited bias, and which, if true, would thus preclude a finding of discrimination.’ (*Guz, supra*, 24 Cal.4th at p. 358) Examples of legitimate reasons are a failure to meet performance standards (*Trop v. Sony Pictures Entertainment Inc.* (2005) 129 Cal.App.4th 1133, 1149) or a loss of confidence in an employee (*Arteaga v. Brink’s, Inc.* (2008) 163 Cal.App.4th 327, 352). [¶] If the employer meets its initial burden, the burden shifts to the employee to ‘demonstrate a triable issue by producing substantial evidence that the employer’s stated reasons were untrue or pretextual, or that the employer acted with a discriminatory animus, such that a

reasonable trier of fact could conclude that the employer engaged in intentional discrimination or other unlawful action.’ [Citation.]” (*Serri, supra*, 226 Cal.App.4th at p. 861, italics omitted.)

In “*Guz*, the Supreme Court emphasized that ‘the great weight of federal and California authority holds that an employer is entitled to summary judgment if, considering the employer’s innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer’s actual motive was discriminatory.’ (*Guz, supra*, 24 Cal.4th at p. 361, fn. omitted.) It is not sufficient for an employee to make a bare prima facie showing or to simply deny the credibility of the employer’s witnesses or to speculate as to discriminatory motive. [Citations.] Rather it is incumbent upon the employee to produce ‘substantial responsive evidence’ demonstrating the existence of a material triable controversy as to pretext or discriminatory animus on the part of the employer. [Citations.]” (*Serri, supra*, 226 Cal.App.4th at pp. 861–862.)

(2) *In moving for summary judgment, the County met its initial burden to present evidence that Shah was terminated for legitimate reasons that were unrelated to unlawful discrimination.*

Here, the County contended it had legitimate, nondiscriminatory reasons for discharging Shah, based on his unsatisfactory performance evaluation, his misconduct in dispensing medication to a customer in an unlabeled vial on June 17, 2015, and his actions related to that incident, namely, repeatedly accessing the patient’s records without a business-related reason, and discussing the incident with his co-workers despite being instructed not to do so.

The County's supporting evidence included the following: Shah's "unsatisfactory" rating for the evaluation period of December 1, 2014 through October 3, 2015; the June 17 incident, which was recorded on video, in which Shah dispensed an unlabeled vial of pills in violation of both state law and County policy;¹⁰ Shah's conduct, as established by a software report, that he accessed the confidential records of patient R.E. and her husband without a business-related reason on six occasions after the June 17 incident; and Shah's conduct in approaching his colleagues to gather information about the County's investigation of the June 17 incident, after being instructed not to do so.¹¹

¹⁰ Business and Professions Code section 4076 provides in relevant part: "(a) A pharmacist shall not dispense any prescription except in a container that meets the requirements of state and federal law and is correctly labeled with all of the following: [¶] (1) . . . either the manufacturer's trade name of the drug or the generic name and the name of the manufacturer. . . . [¶] (2) The directions for the use of the drug. [¶] (3) The name of the patient or patients. [¶] (4) The name of the prescriber [¶] (5) The date of issue. [¶] (6) The name and address of the pharmacy, and prescription number or other means of identifying the prescription. [¶] (7) The strength of the drug or drugs dispensed. [¶] (8) The quantity of the drug or drugs dispensed. [¶] (9) The expiration date of the effectiveness of the drug dispensed. [¶] (10) The condition or purpose for which the drug was prescribed if the condition or purpose is indicated on the prescription."

¹¹ Pharmacy technician Ginger Greer signed an affidavit on June 26, 2015, stating that Shah approached her on June 23 to gather information about the June 17 incident, and another affidavit on June 29, 2015, stating that Shah again had approached her regarding the incident, causing her to be afraid to

We agree with the trial court that the County met its initial burden to demonstrate the existence of legitimate, nondiscriminatory reasons for Shah's discharge.

(3) *In opposing summary judgment, Shah failed to meet his burden to demonstrate a triable issue by producing admissible evidence that the County's stated reasons were untrue or pretextual, or that the County acted with a discriminatory animus.*

In opposing summary judgment, Shah did not dispute that on June 17, 2015, he handed medication to a patient's husband in an unlabeled vial. Rather, Shah asserted that the County had mischaracterized the June 17 incident in an effort to discredit him and discharge him. According to Shah, the patient's husband asked to see the vial, and when Shah complied, he grabbed it and departed the pharmacy.

Shah's alternative version of the June 17 incident, i.e., that the patient's husband grabbed the vial, is insufficient to raise a triable issue as to discriminatory animus. While evidence that an employer's claimed reason for the employee's termination is false may support an inference that the real reason was unlawful, “ “[t]he [employee] cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or

be alone with him. Pharmacy technician Leticia Mendez signed an affidavit stating that on two occasions following the June 17 incident, Shah asked her “whether she was a friend or an enemy.” Also, pharmacist Tai Hyunh signed an affidavit stating that on June 24, 2015, Shah had approached him regarding the June 17 incident.

competent.” ’ ” (*Serri, supra*, 226 Cal.App.4th at p. 863.) Shah’s disagreement with the County’s narrative of the June 17 incident does not give rise to an inference that the County’s decision to terminate him was motivated by discriminatory animus.

Shah also did not dispute that he accessed the records of patient R.E. and her husband on six occasions following the June 17 incident. He simply asserted that “he may have accessed patient R.E.’s records” while performing administrative work at Panoussi’s request. Shah’s suggestion that he accessed the patient records inadvertently does not give rise to an inference that the County was motivated by discriminatory animus in terminating him.

As for the County’s evidence that Shah attempted to interfere in the investigation of the June 17 incident, Shah asserted that it was not until July 2015 that he was told not to discuss the June 17 incident, and he contended that his conversations with pharmacy employees “have been mischaracterized to make it appear that [he] was attempting to color witness testimony.” Shah did admit, however, that he asked pharmacist Tai Hyunh on June 24, 2015 whether he had reported the incident, explaining that “he wanted to ensure that the report was made about the incident.” In opposing summary judgment, it was Shah’s burden to demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer’s proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence, and hence infer that the employer did not act for the asserted non-discriminatory reasons. (*Serri, supra*, 226 Cal.App.4th at p. 863.) Shah’s alternative characterization of his conversations with pharmacy employees merely suggests that the

County's decision may have been wrong or mistaken, not that the County was motivated by discriminatory animus. (*Ibid.*)

In an attempt to demonstrate that his termination was motivated by discriminatory animus, Shah primarily focused on actions and remarks by Panoussi.¹² Shah contended that Panoussi demonstrated discriminatory animus because she gave his assignments and projects to Rana Entabi, a younger temporary pharmacist, made comments about Shah's age and called him "old and dumb," and stated that she did not want to hire older people because they have medical problems and are hard to train. Further, Shah had lodged internal complaints against Panoussi in 2013 and 2014, alleging that she had discriminated against him based on his age.

As the trial court found, this evidence concerning Panoussi's statements and conduct fails to demonstrate that the County's termination of Shah's employment was motivated by discriminatory animus based on Shah's age. As indicated, it was undisputed that the decision to terminate Shah was made by Brooks, the High Desert Health System Administrator. Further, Shah conceded that the vast majority of the issues used to support his discharge stemmed from the June 17 incident. Therefore, even assuming that Panoussi's negative performance

¹² Although Shah could not obtain redress for Panoussi's alleged discriminatory behavior due to his failure to file a timely DFEH complaint with respect to those events, he was not precluded from presenting evidence of prior incidents as relevant background evidence, to show that the County's stated reasons for discharge were pretextual. (*United Air Lines v. Evans* (1977) 431 U.S. 553, 558 [52 L.Ed.2d 571]; *Richards, supra*, 26 Cal.4th at p. 812.)

evaluations were motivated by discriminatory animus, that evidence does not demonstrate that Brooks's decision to terminate Shah's employment, based on the June 17 incident and its aftermath, was motivated by discriminatory animus.

In opposing summary judgment, Shah also contended that other pharmacists had made egregious medication errors, such as dispensing the wrong drugs to patients and mailing medication to the wrong patient, without consequence. Even if this assertion were credited, the County could reasonably conclude that Shah's egregious error in dispensing unlabeled medication, in violation of state law, was not comparable to an inadvertent medication error by pharmacy staff. Further, the County's decision to discharge Shah was based on factors in addition to his dispensing of the unlabeled medication. Therefore, the fact that other pharmacists who made medication errors were not terminated does not raise a triable issue that Shah's termination was motivated by discriminatory animus.

In sum, in opposing summary judgment, Shah failed to raise a triable issue of material fact that the County's stated reasons for his discharge were untrue or pretextual, and that he in fact was terminated on account of his age or disability.

3. *No merit to claim of evidentiary error.*

Shah contends the trial court abused its discretion in sustaining the County's objection No. 17, which excluded a statement by pharmacist Entabi in May 2013 that Shah "look[ed] like a 70-year old, and that [he] should retire."

As discussed above, because Brooks was the decisionmaker, and her termination decision was overwhelmingly based on the June 17, 2015 incident and its aftermath, this 2013 remark by

Entabi is an irrelevancy. Therefore, the trial court's ruling to exclude it was proper and, in any event, was not prejudicial.

Shah also contends the trial court abused its discretion in sustaining the County's objections No. 45, 58 and 59, so as to exclude statements in Shah's declaration as well as two supporting exhibits concerning medication errors by other pharmacists. Through the excluded evidence, Shah sought to show that other pharmacists who dispensed the wrong drug to a patient or who sent a patient medication that belonged to another patient did not suffer any disciplinary action. Notably, however, Shah's declaration did not identify any instances in which another pharmacist dispensed unlabeled medication in violation of state law.

Although the trial court did sustain objections No. 45, 58 and 59, the trial court went on to address Shah's argument that other pharmacists were treated more leniently,¹³ and we have addressed that argument above. Therefore, it is unnecessary to address Shah's contention the trial court erred in sustaining these objections.

¹³ The trial court stated in its ruling: "[Shah] contends that other pharmacists have made egregious medication errors without consequence. (Opp. 10.) Even if the court, viewing the evidence in the light most favorable to Plaintiff, were to assume that [the County's] decision to terminate his employment based on [the June 17] incident [was] unsound and that [the County] used this incident as an excuse to discharge Plaintiff while other pharmacists made egregious medication errors without consequence, Plaintiff would still fail to have met his burden to present substantial evidence that [the County's] actions were motivated by discriminatory animus *based on his age*."

II. The County's cross-appeal.

1. *The trial court acted within its discretion in denying the County's motion for attorney fees.*

After obtaining summary judgment, the County moved for an award of attorney fees pursuant to the rule that a court may award a prevailing defendant in a FEHA action reasonable attorney fees as well as costs if “the court finds the action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so.” (§ 12965, subd. (b); see, e.g., *Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97, 115.)

Here, the trial court ruled that Shah had failed to raise a triable issue of material fact in opposition to the motion for summary judgment, “[b]ut, applying the *Christianburg* standard, it does not appear to this court that the action was maintained in bad faith. [¶] So, for those reasons, the court denies defendant's motion for fees.”

On cross-appeal, the County contends the trial court erred in denying its motion for attorney fees because the trial court should have found that Shah's action was frivolous from the inception. We review the trial court's ruling denying attorney fees to the County pursuant to the deferential abuse of discretion standard of review. (*Chavez, supra*, 47 Cal.4th at p. 989.)

We note that an action is not frivolous simply because the plaintiff's FEHA claim failed. (*Baker v. Mulholland Security & Patrol, Inc.* (2012) 204 Cal.App.4th 776, 784.) A prevailing defendant may recover attorney fees only if the plaintiff's lawsuit is deemed unreasonable, frivolous, meritless, or vexatious; meritless in this context is to be understood as meaning groundless or without foundation, rather than simply that the

plaintiff has ultimately lost his case. (*Robert v. Stanford University* (2014) 224 Cal.App.4th 67, 70.)

Here, although Shah failed to raise a triable issue of material fact in opposition to the motion for summary judgment, the trial court acted within its discretion in finding that Shah's action was not frivolous. Among other things, Shah presented evidence of a history of discriminatory conduct and statements by Panoussi, his supervisor. Ultimately, Shah was unable to base his age discrimination claim on any action other than his discharge on December 9, 2015, as the earlier events were not actionable under the continuing violation doctrine. However, the fact that the earlier claims were barred by Shah's failure to file a timely DFEH complaint does not render those claims frivolous.

As for the June 17 incident, which is at the center of this controversy, Shah's account of the incident was that the patient's husband grabbed the vial and left the pharmacy. Although it was undisputed that Shah dispensed unlabeled medication to a patient, which in and of itself was a legitimate nondiscriminatory reason for the County to discharge him, we cannot say that Shah's account of the June 17 incident was groundless.

For these reasons, the trial court acted within its discretion in denying the County's motion for attorney fees.

DISPOSITION

The judgment in favor of the County, and the postjudgment order denying the County's motion for attorney fees, are affirmed. The parties shall bear their respective costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL
REPORTS**

EDMON, P. J.

We concur:

LAVIN, J.

DHANIDINA, J.